



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF C-O-L-A-T-

DATE: APR. 23, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a non-profit religious organization, seeks to employ the Beneficiary as a pastor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on two grounds. The Director found that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date of May 28, 2014, up to the present. The Director also found that the Petitioner did not establish its eligibility to file the petition because it did not demonstrate that it was a qualified employer at the time of filing capable of offering the Beneficiary a full-time permanent position. The Petitioner filed motions to reopen and reconsider (MTRR), which the Director dismissed on the same grounds as the initial decision. While finding that newly-submitted evidence established the Petitioner's ability to pay the proffered wage in 2016, the Director found that the record still did not establish the Petitioner's ability to pay the proffered wage in 2014 and 2015. The Director also reiterated his previous finding that the evidence of record did not establish that the Petitioner had access to a church facility in which it could offer the Beneficiary full-time permanent employment.

On appeal the Petitioner asserts that the evidence of record, augmented on appeal, overcomes the Director's grounds for denial and establishes its continuing ability to pay the proffered wage as well as its eligibility to file the petition.

Upon *de novo* review, we find that the Petitioner has established its ability to offer full-time employment to the Beneficiary and thus its eligibility to file the petition. However, we also find that the Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present. Accordingly, we will dismiss the appeal on that ground.

**I. LAW**

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the

DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A petitioner must establish its ability to pay the proffered wage of the job offered from the priority date<sup>1</sup> of the petition onward. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

## II. ANALYSIS

As stated in the labor certification, the proffered wage for the proffered position of pastor is \$25,355 per year. The priority date of the petition is May 28, 2014. In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence is considered proof of the petitioner's ability to pay the proffered wage.

In this case, the Petitioner states that it has employed the Beneficiary as a pastor since February 1, 2016, and paid him a salary at the proffered wage rate since then. The Petitioner has submitted a copy of the Form W-2, Wage and Tax Statement, it issued to the Beneficiary for 2016. Based on this evidence we agree with the Director that the Petitioner has established its ability to pay the proffered wage in 2016. Since the Petitioner did not employ the Beneficiary in 2014 or 2015, however, the Petitioner cannot establish its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). A petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

If a petitioner has not employed the beneficiary and paid him (or her) a salary equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year.

On appeal the Petitioner submits copies of its federal tax returns for the years 2014 and 2015 (as well as 2016). The Petitioner is a tax-exempt religious organization that filed its federal tax returns on Form 990-EZ, Short Form, Return of Organization Exempt From Income Tax. These forms listed the Petitioner's revenue and expenses for each year and indicate that the Petitioner had an "excess" of \$19,354 in 2014 and \$1,145 in 2015 (followed by a deficit of \$2,253 in 2016). The "excess" in both 2014 and 2015 was less than the proffered wage of \$25,355. The Form 990-EZ does not record the filer's current assets or current liabilities, and thus does not indicate net current assets or net current liabilities for the year. Therefore, the Petitioner has not established its ability to pay the proffered wage in 2014 or 2015 based on its net income or net current assets as recorded on its federal tax returns for those years.

On appeal the Petitioner asserts that its "Finance Reports" for the fiscal years 2014, 2015, and 2016 (December 1 through November 30), which were submitted with its MTRR, are "annual reports" within the meaning of 8 C.F.R. § 204.5(g)(2). The Petitioner cites a definition of "annual report" in the Merriam-Webster Dictionary as "a usually lengthy report issued yearly by an organization giving an account of its internal workings and especially its finances." The Petitioner's "Finance Reports" are 7-page documents submitted to the church congregation by the senior pastor, a trustee, and the treasurer. They chart various categories of revenue and expenses, but bear no evidence of having been reviewed or audited by an independent accountant or financial expert from outside the organization. The charts are not supplemented by any narrative describing the Petitioner's financial activities over the previous year. Nor does the Petitioner identify any specific figure or figures in the 2014 or 2015 reports which demonstrate its ability to pay the proffered wage in those years. Accordingly, regardless of the Petitioner's characterization of its "Finance Reports" as annual reports, we find that they have little evidentiary weight for the reasons discussed above. They do not establish the Petitioner's ability to pay the proffered wage in either 2014 or 2015.

The Petitioner previously submitted [REDACTED] bank statements from May 2014 through January 2016 as evidence of its ability to pay the proffered wage. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While the regulation allows bank account records to be considered "in appropriate cases" the Petitioner has not explained why this is such a case. Furthermore, the funds reported on the Petitioner's bank statements would ordinarily be reflected on its tax return(s), and would thus not represent additional financial resources. Finally, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In this case, for example, looking at the monthly closing balances in 2014 and 2015, if the proffered wage had been paid starting on the priority date of May 26, 2014, the Petitioner's bank account would

have been totally depleted by the end of August 2015, leaving the Petitioner unable to pay the proffered wage over the last four months of that year. Accordingly, the Petitioner's [REDACTED] bank account statements are not persuasive evidence of its continuing ability to pay the proffered wage in 2014 and 2015.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner indicates that it was organized as a church in 2005 and had two employees at the time the petition was filed in 2015. The Petitioner has not indicated whether the Beneficiary will replace another employee. The 2016 federal income tax return listed the Beneficiary as assistant pastor and [REDACTED] as pastor, thus indicating that in the initial year of his employment the Beneficiary was not replacing another employee. The federal tax returns from 2014 to 2016 show that the Petitioner's total annual revenue and end-of-year net assets were modest and relatively steady. Total revenue was below \$100,000 each year, while net assets were in the range of \$25,000-\$27,000. Thus, there is not a long record of historical growth, and for the three years 2014-2016 the Petitioner does not appear to have grown at all. The Petitioner has not claimed that the Beneficiary would replace any other employee or outsourced service and has not highlighted any uncharacteristic expense in the years in question. We conclude, therefore, that the Petitioner has not established its ability to pay the proffered wage in 2014 and 2015 based on the totality of its circumstances, as in *Sonogawa*.

For all of the reasons discussed above, the Petitioner has not established its continuing ability to pay the proffered wage of \$25,355 per year from the priority date of May 26, 2014, up to the present.

### III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-O-L-A-T*, ID# 1161569 (AAO Apr. 23, 2018)